

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Nov 13, 2024

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

KEVIN NICHOLAS GEORGE,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
STATE, U.S. EMBASSY IN ANKARA,
TURKEY, ANTONY BLINKEN,
JEFFREY L. FLAKE,

Defendants.

No. 2:24-CV-260-MKD

ORDER GRANTING MOTION
TO DISMISS

ECF No. 8

Before the Court is Defendants' Motion to Dismiss. ECF No. 8. Plaintiff seeks to compel action on Plaintiff's fiancée's pending visa application. ECF No.

1. The Court has reviewed the record and is fully informed. For the reasons set forth below, the Court grants the motion.

BACKGROUND

The following facts are alleged in the Complaint. ECF No. 1. Plaintiff is a United States citizen. *Id.* at 1 ¶ 1. Neda Tadayon is Plaintiff's fiancée. *Id.* at 3 ¶ 10. Ms. Tadayon is a citizen of Iran. *Id.* at 1 ¶ 2.

ORDER - 1

Plaintiff filed a visa petition on his fiancée’s behalf with USCIS on July 25, *Id.* at 3 ¶ 12. USCIS approved the visa petition on July 17, 2023. *Id.* Subsequently, Ms. Tadayon’s case was processed and sent to the U.S. Embassy in Ankara, Turkey, where she was interviewed on December 1, 2023. *Id.* at 4 ¶¶ 15-16. After the interview, a consular officer requested additional information and Tadayon submitted a completed DS-5535 form. *Id.* ¶ 16. Plaintiff alleges that Defendants have “refused to issue a final decision on this case” since that time. *Id.*

Plaintiff filed this action on July 29, 2024, alleging unreasonably delay under the Administrative Procedures Act (APA)¹ and a violation of his Fifth Amendment right to due process. *Id.* at 4-6.

LEGAL STANDARD

A motion to dismiss may be brought for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). “A Rule 12(b)(1) jurisdictional attack may be facial or factual.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). The Court’s review of a facial attack, as here, is limited to the allegations in the

¹ Although Plaintiff styles his first cause of action as arising under the APA, his request for relief seeks a writ of mandamus. ECF No. 1 at 6-7. As discussed below, the Court addresses the sufficiency of both an APA and Mandamus Act claim.

1 complaint. *Id.* If the jurisdictional attack is successful, the Court must dismiss the
2 action. Fed. R. Civ. 12(h)(3).

3 “To survive a [Fed. R. Civ. P. 12(b)(6)] motion to dismiss, a complaint must
4 contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is
5 plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell*
6 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “Threadbare recitals of the
7 elements of a cause of action, supported by mere conclusory statements, do not
8 suffice.” *Id.* In considering a motion to dismiss for failure to state a claim, the
9 Court must accept as true the well-pleaded factual allegations and any reasonable
10 inference to be drawn from them, but legal conclusions are not entitled to the same
11 assumption of truth. *Id.* A complaint must contain either direct or inferential
12 allegations respecting all the material elements necessary to sustain recovery under
13 some viable legal theory. *Twombly*, 550 U.S. at 562. “Factual allegations must be
14 enough to raise a right to relief above the speculative level.” *Id.* at 555.

15 **DISCUSSION**

16 Defendants move to dismiss Plaintiff’s Complaint under Rule 12(b)(6),
17 contending it fails to state a claim for unreasonable delay and a cognizable due
18 process violation. Defendants also argue the Court lacks jurisdiction over
19 Plaintiff’s unreasonable delay claim. ECF No. 8 at 6-11. However, because
20

1 Plaintiff's fiancée's application remains in administrative processing, *see id.* at 10;
2 ECF No. 10 at 2, the Court addresses this claim on the merits.

3 **A. Administrative Procedure Act**

4 The APA governs the procedures of administrative law. *See* 5 U.S.C. §§
5 500-596. The APA requires "within a reasonable time, each agency shall proceed
6 to conclude a matter presented to it." *Id.* at § 555. The APA authorizes reviewing
7 courts to "compel agency action unlawfully withheld or unreasonably delayed."
Id. at § 706(1).

9 *1. Unlawfully Withheld*

10 "In the Ninth Circuit, an action is 'unlawfully withheld' if 'Congress has
11 specifically provided a deadline for performance' and the agency has not met that
12 deadline." *Alaska Indus. Dev. & Exp. Auth. v. Biden*, 685 F. Supp. 3d 813, 857 (D.
13 Alaska 2023) (quoting *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177
14 n.11 (9th Cir. 2002)).

15 Congress has provided a recommended processing time of immigration
16 benefit applications of "not later than 180 days after the initial filing of the
17 application[.]" 8 U.S.C. § 1571. However, this 180-day Congressional
18 recommendation for the conclusion of immigration benefit applications is not a
19 requirement. *See Reyes v. Miller*, No. 23-CV-5121, 2024 WL 2947716, at *8
20 (E.D. Wash. June 11, 2024) (reaffirming that the language of 8 U.S.C. § 1571(b)

1 “is treated as ‘non-binding, legislative dicta.’”’) (quoting *Yang v. Cal. Dep’t of Soc.*
 2 *Servs.*, 183 F.3d 953, 961-62 (9th Cir. 1999)). Absent a statutory deadline within
 3 which Defendants must act, the Court cannot conclude Defendants have
 4 “unlawfully withheld” action.

5 “When there is no set deadline by which an agency must act, a court
 6 evaluates whether the agency’s delay is unreasonable by applying the six factors
 7 established by the D.C. Circuit in *Telecommunications Research & Action Center*
 8 *v. FCC* [“*TRAC*”] and adopted by the Ninth Circuit in *Independence Mining Co. v.*
 9 *Babbitt[.]*” *Alaska Indus. Dev. & Exp. Auth.*, 685 F. Supp. 3d at 857 (citing 750
 10 F.2d 70 (D.C. Cir. 1984); 105 F.3d 502, 507 (9th Cir. 1997)).

11 2. *Unreasonably Delayed*

12 To succeed on an APA unreasonable delay claim, Plaintiff must show that:
 13 (1) the agency has a nondiscretionary duty to act; and (2) the agency has
 14 unreasonably delayed in acting on that duty. *Norton v. S. Utah Wilderness All.*,
 15 542 U.S. 55, 62-64 (2004).

16 As noted above, the Ninth Circuit evaluates delay using the *TRAC* factors.
 17 *Indep. Mining Co.*, 105 F.3d at 507 (citing *Telecomm. Rsch. Action Ctr.*, 750 F.2d
 18 at 80). These factors are as follows:

- 19 (1) the time agencies take to make decisions must be
 20 governed by a “rule of reason”[;]
 (2) where Congress has provided a timetable or other
 indication of the speed with which it expects the agency to

1 proceed in the enabling statute, that statutory scheme may
2 supply content for this rule of reason[;]
3

4 (3) delays that might be reasonable in the sphere of
5 economic regulation are less tolerable when human health
6 and welfare are at stake[;]
7

(4) the court should consider the effect of expediting
delayed action on agency activities of a higher or
competing priority[;]
5

6 (5) the court should also take into account the nature and
extent of the interests prejudiced by the delay[;] and
7

(6) the court need not “find any impropriety lurking behind
agency lassitude in order to hold that agency action is
unreasonably delayed.”

8 *Id.*

9 While courts evaluate the *TRAC* factors with caution at the motion to
10 dismiss stage, *see, e.g.*, *Sarlak v. Pompeo*, No. 20-35, 2020 WL 3082018, at *5

11 (D.D.C. June 10, 2020) (citing *Mashpee Wampanoag Tribal Council, Inc. v.*

12 *Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003)), courts have utilized the *TRAC*

13 factors at the motion to dismiss stage in cases, as here, involving allegations of

14 unreasonably delayed waiver determinations. *See id.* (collecting cases). In these

15 cases, the *TRAC* factors are used to determine whether a “complaint has alleged

16 facts sufficient to state a plausible claim for unreasonable administrative delay.”

17 *Ghadami v. Dep’t of Homeland Sec.*, No. 19-CV-397, 2020 WL 1308376, at *7 n.

18 6 (D.D.C. Mar. 19, 2020). In alignment with these other courts, the Court utilizes

19 the *TRAC* factors to analyze Plaintiff’s claim of unreasonable agency delay.

1 i. The First Factor

2 “[T]he time agencies take to make decisions must be governed by a ‘rule of
3 reason.’” *Indep. Mining Co.*, 105 F.3d at 507 (quoting *Telecomm. Rsch. Action*
4 *Ctr.*, 750 F.2d at 80). While this first factor is the most important factor, it is not,
5 by itself, determinative. *A Cmtv. Voice v. EPA*, 878 F.3d 779, 786 (9th Cir. 2017).

6 Defendants concede Ms. Tadayon’s application has been pending
7 administrative processing for approximately eleven months. ECF No. 8 at 17.

8 “Repeatedly, courts in this and other circuits have concluded that ‘a
9 reasonable time for agency action is typically counted in weeks or months, not
10 years.’” *Vaz v. Neal*, 33 F.4th 1131, 1138 (9th Cir. 2022) (quoting *In re Nat. Res.*
11 *Def. Council, Inc.*, 956 F.3d 1134, 1139 (9th Cir. 2020)). However, district courts
12 in the Ninth Circuit have found that lengthier delays were not “unreasonable.”
13 *Kapoor v. Blinken*, No. 21-CV-1961, 2022 WL 181217, at *4 (N.D. Cal. Jan. 20,
14 2022) (citing cases with delays ranging from three to five years, all of which were
15 considered not to be unreasonable); *see, e.g., Yavari v. Pompeo*, No. 19-CV-2524,
16 2019 WL 6720995, at *8 (C.D. Cal. Oct. 10, 2019) (“District courts have generally
17 found that immigration delays in excess of five, six, seven years are unreasonable,
18 while those between three to five years are often not unreasonable.”); *Islam v.*
19 *Heinauer*, 32 F. Supp. 3d 1063, 1071 (N.D. Cal. 2014) (“In this district, courts
20 have generally found delays of four years or less not to be unreasonable.”). As the

1 court explained in *Yavari*, “slightly more than a year is drastically short of what
2 constitutes an unreasonable delay.” 2019 WL 6720995, at *8. Rather, “only very
3 substantially longer delay could constitute sufficient factual allegations to
4 implicate § 706(1)’s unreasonable delay or § 555(b)’s reasonable time,” and “only
5 the passage of a substantial[ly] longer period of time can cure this issue as a matter
6 of law.” *Id.*

7 The time Ms. Tadayon’s application has been pending administrative
8 processing thus falls short of what is generally accepted as a “unreasonable delay.”
9 On this record, the first—and most important—*TRAC* factor strongly weighs in
10 Defendants’ favor.

11 ii. The Second Factor

12 The second factor considers whether “Congress has provided a timetable.”
13 *Indep. Mining Co.*, 105 F.3d at 507 (citing *Telecomm. Rsch. Action Ctr.*, 750 F.2d
14 at 80). As noted above, the 180-day Congressional recommendation for the
15 completion of agency action is not a mandatory time requirement. Plaintiff does
16 not dispute that Congress has not established a “firm timeframe” for scheduling.
17 ECF No. 9 at 16. Defendants correctly identify that Plaintiff’s “concession is
18 dispositive of the second *TRAC* factor.” ECF No. 10 at 5. This factor therefore
19 weighs in Defendants’ favor.

1 iii. The Third and Fifth Factors

2 As to the third and fifth factors—human health and welfare at stake and the
3 extent of interests prejudiced by the delay—Plaintiff alleges Defendants’ delay had
4 caused “tremendous emotional and financial hardship for Plaintiff and Neda
5 Tadayon, among other ways.” ECF No. 1 at 6 ¶ 32. However, “such hardships are
6 common burdens shared by those waiting for . . . immigration applications.”

7 *Reyes*, 2024 WL 2947716, at *8. As in *Reyes*, “Plaintiff[] ha[s] not alleged facts
8 that show that t[his] emotional distress and financial concerns are of such severity
9 that [he] state[s] a claim for plausible relief” within the Complaint. *Id.* These
10 factors weigh in Defendants’ favor.

11 iv. The Fourth and Sixth Factors

12 As to the fourth and sixth factors—the agency’s completing priorities and
13 impropriety—Plaintiff has neither demonstrated that an expediting of the action is
14 necessary on account of a higher or competing priority nor has he alleged bad faith
15 by Defendants. *See Indep. Mining Co.*, 105 F.3d at 507 n.7 (quoting *Telecomm.*
16 *Rsch. Action Ctr.*, 750 F.2d at 80). These factors weigh in favor of Defendants.

17 Accordingly, having weighed the *TRAC* factors and accepting as true
18 Plaintiff’s well-pleaded factual allegations, the Court concludes Plaintiff has not
19 stated an APA claim for unreasonable delay that is plausible on its face. Plaintiff’s
20 APA claim is accordingly dismissed.

1 **B. Mandamus**

2 “Mandamus is an extraordinary remedy and is available to compel a federal
3 official to perform a duty only if: (1) the individual’s claim is clear and certain; (2)
4 the official’s duty is nondiscretionary, ministerial, and so plainly prescribed as to
5 be free from doubt, and (3) no other adequate remedy is available.” *Patel v. Reno*,
6 134 F.3d 929, 931 (9th Cir. 1997) (citing *Azurin v. Von Raab*, 803 F.2d 993, 995
7 (9th Cir. 1986)). “The party seeking mandamus has the burden of showing that its
8 right to issuance of the writ is clear and indisputable.” *Am. Hosp. Ass’n*, 812 F.3d
9 183, 189 (D.C. Cir. 2016) (citing *Power*, 292 F.3d 781, 784 (D.C. Cir. 2002)).
10 “[M]andamus is a ‘drastic and extraordinary’ remedy “reserved for really
11 extraordinary causes.” *Van Dusen v. United States Dist. Court for the Dist. of*
12 *Ariz.*, 654 F.3d 838, 840 (9th Cir. 2011) (citing *Ex parte Fahey*, 332 U.S. 258, 259-
13 60 (1947)).

14 The Ninth Circuit has recognized that relief sought under the Mandamus Act
15 and under the APA is “essentially the same.” *Indep. Mining Co.*, 105 F.3d at 507.
16 Thus, “when a complaint seeks relief under the Mandamus Act and the APA and
17 there is an adequate remedy under the APA, [the Court] may elect to analyze the
18 APA claim only.” *Vaz*, 33 F.4th at 1135. “If Plaintiffs’ APA claim fails, their
19 claim under the Mandamus Act fails as well.” *Infracost Inc. v. Blinken*, No. 23-

20

1 CV-2226, 2024 WL 1914368, at *5 (S.D. Cal. Apr. 30, 2024) (citing *Vaz*, 33 F.4th
2 at 1138-39).

3 Because Plaintiff appears to seek relief under the APA and the Mandamus
4 Act, the Court need not separately analyze whether Plaintiff is entitled to a writ of
5 mandamus. *See, e.g., Shahijani v. Laitinen*, No. 2:23-CV-03967, 2023 WL
6 6889774, at *2 (C.D. Cal. Oct. 6, 2023) (“Where, as here, a plaintiff seeks identical
7 relief under the APA and the Mandamus Act, courts routinely elect to analyze both
8 claims under the APA only.”). Because Plaintiff failed to plead a valid APA claim,
9 as discussed above, the Court necessarily concludes Plaintiff is not entitled to a
10 writ of mandamus.

11 **C. Due Process**

12 Plaintiff contends he “has vested interest in the adjudication of his fiancée
13 visa application,” arguing Defendants’ “inaction has violated” his “due process
14 rights” and “irrevocably harmed him by causing a physical, financial and
15 emotional toll due to the uncertainty and immense hardship.” ECF No. 9 at 21.
16 Plaintiff points to *Bustamante v. Mukasey*, 531 F.3d 1059 (9th Cir. 2016), but his
17 reliance on it is misplaced. There, the Ninth Circuit held that “a U.S. citizen
18 raising a constitutional challenge to the denial of a visa is entitled to a limited
19 judicial inquiry regarding the reason for the decision.” 531 F.3d at 1062. By
20 contrast, here, Plaintiff’s “right revolves around receiving a final answer, properly

1 adjudicated, from Defendants without unnecessary delay.” ECF No. 9 at 21. As
2 Defendants correctly note, this argument is “not tethered to a privately actionable
3 cause of action and amount[s] to little more than conclusory statements.” ECF No.
4 10 at 8 (citing *Iqbal*, 556. U.S. at 678). The Court thus concludes Plaintiff has
5 failed to state a cognizable due process claim.

6 **CONCLUSION**

7 For the reasons explained above, the Court grants Defendants’ Motion to
8 Dismiss, ECF No. 8.

9 Accordingly, **IT IS HEREBY ORDERED:**

10 1. Defendants’ Motion to Dismiss, **ECF No. 8**, is **GRANTED**.

11 3. Plaintiff’s Complaint, **ECF No. 1**, is **DISMISSED** without prejudice.

12 The District Court Executive is directed to file this Order, enter judgment for
13 Defendants, provide copies to counsel, and **CLOSE THE FILE**.

14 DATED November 13, 2024.

15 *s/Mary K. Dimke*
16 MARY K. DIMKE
17 UNITED STATES DISTRICT JUDGE
18
19
20